

DECISION



18814
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200678

DATE: July 13, 1981

MATTER OF: Champion Road Machinery International
Corporation

DIGEST:

Alleged discrepancy of two net flywheel horsepower between 168 horsepower road grader bid and 170 horsepower IFB requirement should have been waived as minor deviation since it had no effect on either price, quantity, quality or delivery.

Champion Road Machinery International Corporation (Champion) protests an award to Arnold Machinery Company for a type I, size 6 motorized road grader by the Bureau of Indian Affairs (BIA) under invitation for bids (IFB) 80-40-9-18. The protester's low bid was rejected because descriptive data submitted with the bid indicated that the engine powering the grader would produce only 168 net flywheel horsepower, not 170 horsepower as specified in the IFB. Net flywheel horsepower is net engine horsepower after power reductions for the application involved and accessories.

The protester believes that rejection of its bid was improper. Champion points out that unknown to the firm when submitting the bid, the grader manufacturer had reduced the power required to drive the engine accessories, increasing net flywheel horsepower to 172. Thus, the product offered actually was a conforming product. Champion also argues that: (1) the 170 horsepower requirement which BIA relied upon unduly restricted competition in any case, and (2) the two horsepower discrepancy between that requirement and the equipment bid was at most a minor deviation which should have been waived. In this respect, Champion says that the equipment offered meets the performance requirements of Federal Specification 00-G-630E for these graders which contains no minimum horsepower requirement.

[Protest Alleging Improper Rejection of Bid]

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The protest is sustained.

The IFB schedule lists the equipment required as follows:

"Grader, Road, Motorized, Size 6, Type I, in accordance with Federal Specification 00-G-630E * * * and the following:

Minimum S.A.E. Net H.P. to be 170 * * *."

The IFB required a bidder to describe the equipment proposed on a form provided. Item "n" on the form was labeled "Net flywheel horsepower", for which Champion indicated 168 horsepower at 2100 r.p.m. Noting that Champion's grader would not produce the 170 horsepower required by the IFB, BIA rejected the bid as nonresponsive. In this respect, it is not disputed that the net horsepower requirement in the IFB schedule refers to net flywheel horsepower.

In a report submitted to our Office by BIA, the agency argues that the protest against the specified minimum horsepower, filed after bid opening, is untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), which requires that alleged improprieties which are apparent from the IFB as issued be filed prior to bid opening. However, we do not have to consider the timeliness of Champion's complaint that the 170 horsepower requirement was unduly restrictive because on the present record we believe the two net horsepower discrepancy should have been waived by BIA.

As indicated, Champion says a 168 horsepower grader meets all requirements of the Federal Specification which, as Champion points out, does not include a specific engine horsepower requirement. (The specification defines power by specifying blade pull capacity.) Champion argues that the difference between a net 168 horsepower and 170

horsepower is insignificant with respect to the ability of a grader to meet the performance requirements set out in the Federal Specification, which do not depend exclusively on power but also upon factors such as the weight and weight distribution of the grader, i.e., on factors which affect the mechanical efficiency with which engine horsepower is delivered to perform useful work. In other words, Champion's argument continues, an efficient grader may outperform a higher net horsepower machine, even though its engine generates less net horsepower. It may also outlast the higher rated machines. For example, as the record indicates, the engine for the Champion-offered grader actually is capable of producing 200 horsepower but is derated (i.e., downgraded) by the engine manufacturer to 175 horsepower for grader applications in order to increase its durability. (The net of 168 horsepower reflects further power reduction by the grader manufacturer to accommodate accessories.)

The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception the exact thing called for in the invitation, which upon acceptance will bind the contractor to perform in accordance with all its material terms and conditions. National Radio Company, Inc.; Bruno-New York Industries Corp., B-198240, July 25, 1980, 80-2 CPD 67.

However, Federal Procurement Regulations (FPR) § 1-2.405 (1964 ed.) states that the Government must either waive or afford a bidder the opportunity to cure a minor informality or irregularity in a bid, i.e., an informality or irregularity which is merely a matter of form and not of substance or which pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirements of the solicitation. See Iannuccillo Construction Co. and ACMAT Corporation, B-192954, December 13, 1978, 78-2 CPD 411. A defect or variation is immaterial and inconsequential under the FPR when its significance as to quality, quantity, delivery or price is trivial or negligible when compared with the total cost or scope of supplies or work to be furnished.

We recognize that Champion clearly indicated in its bid that it would not furnish a grader incorporating an engine which would deliver exactly 170 net flywheel horsepower. However, we believe that the deviation from the IFB specification was immaterial and should have been waived under FPR § 1-2.405.

As to the horsepower deviation's effect on quality, the theoretical power which an engine must be capable of delivering while a grader is operating can be computed from data in the Federal Specification, and for equipment specified as size 6 is found to be significantly less than the 170 horsepower figure which BIA used. In fact, there really is no suggestion in the record that a machine capable of producing 168 net flywheel horsepower will not meet the Government's needs as expressed in the Federal Specification. In this respect, although BIA has been specifically asked, it has declined to explain what purpose was meant to be served by the 170 minimum horsepower rating and why it apparently believes that Champion's offer of a 168 horsepower machine should not be considered a minor deviation from the 170 horsepower requirement in view of the protester's claim that its equipment meets the detailed Federal Specification performance requirements.

In view of the above, the two horsepower deviation would appear to have no material effect on the quality of the product which was required. Cf. Sulzer Bros., Inc., and Allis-Chalmers Corporation, B-188148, August 11, 1977, 77-2 CPD 112.

Since the alleged deficiency clearly had no bearing on quantity or on the terms of delivery required by the solicitation, we turn to examine the effect if any which it might have had on price. Whether a deviation from an invitation's stated requirement has a material effect on price is determined by comparing the difference between the bidder's price and the expected price from that bidder for a conforming bid. See, e.g., Roarda, Inc., B-192443, November 22, 1978, 78-2 CPD 359. While the fact that Champion's product actually would have met the 170 horsepower specification cannot be used to explain Champion's bid, because it was first disclosed

after bid opening, it does establish that there is no difference in price between the grader bid and a conforming grader. The deviation in Champion's bid, therefore, did not have a material effect on price.

Champion's protest is sustained.

The grader purchased from Arnold was delivered shortly after award, and in the circumstances, remedial corrective action benefiting Champion is precluded. Moreover, since the circumstances of this case are unlikely to recur, we do not believe a recommendation to BIA regarding the procurement practices which it should use in similar future cases would serve any useful purpose.


Acting Comptroller General
of the United States